(3)

No. 06-1646

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent contends (Br. in Opp. 4-16) that this Court should not grant certiorari because there is no circuit conflict on the question whether recidivist enhancements to prior offenses should be taken into account in determining the maximum sentence that could have been imposed on a recidivist offender for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. IV 2004), and because the Ninth Circuit has correctly held that they should not. Since the filing of the petition for certiorari, however, the First Circuit has joined two other circuits in holding that recidivist enhancements should be taken into account; in so doing, it cited and then rejected the Ninth Circuit's approach. Respondent's labored efforts to distinguish that decision, and the similarly irreconcilable decisions of other circuits, are unavailing. Respondent's arguments in defense of the Ninth Circuit's decision also lack merit. If it is allowed to stand, the Ninth Circuit's decision will limit the government's ability to obtain appropriate sentences for dangerous career offenders in

the Nation's largest circuit—and the underlying approach it embodies is already having adverse consequences in other areas of the law. The petition for certiorari should therefore be granted.

1. Contrary to respondent's contentions (Pet. 5-12), the decision below either conflicts or is in tension with the decisions of other courts of appeals.

a. In *United States* v. *Duval*, No. 05-2163, 2007 WL 2253505 (Aug. 7, 2007), the First Circuit held that a Maine conviction for assault constituted a violent felony "punishable by imprisonment for a term exceeding one year" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B), because, under the assault statute's recidivist sentencing provision, the defendant was sentenced to the maximum sentence of five years in prison. 2007 WL 2253505, at *12-*16. In holding that the recidivist sentencing statutes should be considered in determining the maximum sentence that could have been imposed, the First Circuit acknowledged the defendant's contention that such a holding would conflict with the Ninth Circuit's holding in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), on which the panel relied in this case. 2007 WL 2253505, at *13. The First Circuit nevertheless considered the recidivist enhancement, relying on one of the *dissenting* opinions in *Corona-Sanchez* to dismiss concerns that only recidivism had raised the assault from a misdemeanor to a felony. *Id.* at *16 (citing 291 F.3d at 1219 (opinion of Kozinski, J.)).

Respondent offers two bases for distinguishing *Duval*, each of which lacks merit. Respondent first contends (Br. in Opp. 11 n.3) that *Duval* does not "literal[ly]" conflict with the decision below because it involves the definition of a "violent felony," not a "serious drug offense," under the ACCA. The two definitions,

however, are functionally indistinguishable for purposes of the question presented in the petition, as both embrace the same approach in focusing on the maximum term available for an offense. The ACCA defines "violent felony" to include certain state-law crimes "punishable by imprisonment for a term exceeding one year," 18 U.S.C. 924(e)(2)(B), and it defines "serious drug offense" to include certain state-law offenses "for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii). Under *Corona-Sanchez* and the decision below, the Ninth Circuit would clearly construe both provisions of the ACCA to exclude consideration of recidivist enhancements.

Respondent also contends (Br. in Opp. 10-11 n.3) that, in *Duval*, the First Circuit "regarded it as crucial" that the underlying offense was treated as a felony, rather than a misdemeanor, as a matter of state law. The First Circuit did note the "conundrum[]" that, under the ACCA, a person could be convicted of three "violent felonies" even if, but for the person's prior recidivism, one or more of the offenses would have been classified as misdemeanors under state law. See 2007 WL 2253505, at *14. But the court ultimately concluded that Maine *did* treat respondent's offense as a felony because of his enhanced punishment as a recidivist, and thus treated it as a qualifying offense under the ACCA. See *id.* at *16. The court thus held that, under the ACCA, recidivist enhancements should be taken into account in determining the maximum sentence that could have been imposed for a predicate offense—a holding that squarely conflicts with the holding below. And in any event, because *Duval* and this case both involved felonies under state law, the two cases are factually indistinguishable in all relevant senses.

b. Respondent asserts (Br. in Opp. 6-7) that the decision below does not conflict with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467 (per curiam), cert. denied, 543 U.S. 967 (2004), because the defendant in *Henton* argued only that the prosecutor failed to seek a recidivist enhancement under state procedure (and not that recidivist enhancements should not be considered in determining the maximum sentence that could have been imposed). As respondent notes (Br. in Opp. 6), the Seventh Circuit rejected the procedural argument on the ground that "the statute does not contain any prerequisites, other than recidivism, to qualify for the extended term." *Henton*, 374 F.3d at 469.

As respondent conspicuously fails to note, however, in the very next sentence, the Seventh Circuit reasoned that, "[m]ore importantly, it is irrelevant under ACCA whether [the defendant] actually received an extended sentence on his [prior] conviction; what matters is the sentence that the state statute made possible." *Henton*, 374 F.3d at 470. The court concluded that, "[b]ecause [the defendant] was eligible for up to fourteen years' imprisonment, the district court properly concluded that the [prior] conviction qualifies as a 'serious drug offense' under ACCA." *Ibid.* Regardless of what the defendant argued in his brief, that reasoning plainly constitutes a holding, rather than dicta, because the Seventh Circuit could not have affirmed the application of the ACCA to the defendant without concluding that recidivist enhancements could be considered. Consistent with that view, the Seventh Circuit, in reaching the same result in a later case, described *Henton* as "*appl[ying] th[e] rule*" that the ACCA "inquires about the highest possible penalty": *i.e.*, the penalty applicable to a recidivist offender. *United States* v. *Perkins*, 449 F.3d 794, 796 (emphasis

added), cert. denied, 127 S. Ct. 330 (2006). As the Ninth Circuit acknowledged (Pet. App. 16a n.6), therefore, *Henton* also conflicts with the decision below.

c. Respondent seeks to distinguish *Mutascu* v. *Gonzales*, 444 F.3d 710 (5th Cir. 2006) (per curiam) (Br. in Opp. 8-9), because it involved a different statutory provision, 8 U.S.C. 1101(a)(43)(G), which defines an "aggravated felony," for purposes of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, to include certain offenses "for which the term of imprisonment [is] at least one year." While the statute in *Mutascu* provides that the relevant "term of imprisonment" is deemed to include the period of incarceration that was initially ordered, even if a portion of that period is suspended, see 8 U.S.C. 1101(a)(48)(B), that language merely indicates that, *at a minimum*, the relevant "term of imprisonment" is the term that was actually imposed. That statute, moreover, is the same statute that was at issue in *Corona-Sanchez*, in which the Ninth Circuit first held that recidivist enhancements to prior offenses may not be taken into account in determining the maximum sentence that could have been imposed. In *Mutascu*, the Fifth Circuit refused to "follow the reasoning" of *Corona-Sanchez*, 444 F.3d at 712; in the decision below, the Ninth Circuit held that it was bound by the "rationale" of *Corona-Sanchez*, Pet. App. 12a, and acknowledged that its decision was in tension with *Mutascu*, *id.* at 16a n.6. The Fifth Circuit has thus rejected the reasoning of the Ninth Circuit challenged here.

Respondent further contends (Br. in Opp. 9) that the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535 (2003), is not even in tension with the decision below. It is true that, in *Williams*, the Fourth Circuit concluded only that the defendant was not subject to the ACCA because the state prosecutor had not taken the procedural

2. Respondent additionally contends (Br. in Opp. 12-16) that the Ninth Circuit's decision was correct. Respondent's various merits arguments provide no reason for denying certiorari and are in any event unsound.

a. Respondent first asserts (Br. in Opp. 12) that the text of Section 924(e)(2)(A)(ii) supports the court of appeals' construction, because the "offense" for which respondent was convicted was delivery of a controlled substance *simpliciter* (not delivery of a controlled substance by a recidivist). Section 924(e)(2)(A)(ii), however, treats a prior drug offense as "serious" if the offense is one "for which a maximum term of imprisonment of ten years or more is prescribed by law." Because respondent was a recidivist, the "maximum term of imprisonment" for *his* offense was ten years, not the five years he would have received if he were a first-time offender. There is no textual basis for the conclusion that the "maximum term of imprisonment" is the lowest (or, for that matter, highest) maximum to which a hypothetical offender could have been subject, rather than the real maximum to which the defendant was actually subject.

b. Like the Ninth Circuit, respondent principally relies (Br. in Opp. 13-14) on *Taylor* v. *United States*, 495 U.S. 575 (1990), which in respondent's view stands for the proposition that courts should take "a 'formal cate-

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steps necessary to trigger an enhanced sentence for recidivism on one of the defendant's underlying predicate offenses. *Id.* at 538-539. As respondent seemingly recognizes, however, that conclusion strongly suggests that the Fourth Circuit believed that, where the necessary procedural steps *have* been taken, recidivist enhancements *should* be considered in determining the maximum sentence that could have been imposed. Indeed, in *Duval*, the First Circuit appears to have read *Williams* in precisely that manner. See 2007 WL 2253505, at *14. At a minimum, therefore, *Williams* is in tension with the decision below—as the Ninth Circuit recognized. See Pet. App. 16a n.6.

gorical approach' to determining whether a state conviction qualifies as an ACCA predicate offense under Section 924(e)." Br. in Opp. 13 (citation omitted). In *Taylor*, however, the Court held only that, in determining whether a particular statute proscribed generic "burglary" of the type that qualifies as an ACCA predicate offense, a court should look at the elements of the crime and not the facts of the conviction. 495 U.S. at 598, 600, 602. The considerations underlying *Taylor* do not justify extending it to this context. Determining whether a defendant was subject to a recidivist enhancement is a different (and easier) task than establishing the facts of the defendant's conduct, because a court need only consider court documents—such as the judgment or the sentencing transcript—in order to answer that question. Even under *Taylor*, a court may resort to judicial records (such as indictments and jury instructions) to determine whether a defendant was convicted of a generic offense. See *Shepard* v. *United States*, 544 U.S. 13, 16, 23 & n.4 (2005). And while respondent contends that whether a defendant was a recidivist is a "fact[ual]" question (Br. in Opp. 14 & n.6), respondent does not argue that resolution of that question would trigger "collateral trials" and "evidentiary disputes" of the type that *Taylor* sought to prevent. *Shepard*, 544 U.S. at 23 & n.4.

c. Respondent also relies (Br. in Opp. 15-16) on *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Those decisions, too, address a different question. Together, they stand only for the proposition that, whereas a fact that increases an otherwise-applicable maximum sentence must be submitted to the jury and proved beyond a reasonable doubt, the fact of a prior sentence-enhancing conviction need not. As a result, recidivism

need not be treated as an element of the offense for *constitutional* purposes. For ACCA purposes, however, the relevant question is not whether recidivism is an offense element; rather, the question is whether a recidivist enhancement should be ignored when the defendant was a recidivist. Respondent's position is that the "maximum term of imprisonment" should be deemed an artificial maximum to which a non-recidivist defendant would be exposed, rather than the real maximum that a recidivist defendant faces. Under respondent's position, a recidivist defendant would be credited with the unenhanced maximum for ACCA purposes, even if he actually received a qualifying ten-year sentence for his state offense. Neither *Almendarez-Torres* nor *Apprendi* requires that anomalous result.

d. Finally, notwithstanding his recognition that he has waived the underlying argument to the contrary, respondent contends (Br. in Opp. 15) that the government's interpretation is "internally inconsistent" because the government has argued that the relevant "maximum term of imprisonment" is the statutory maximum, rather than any lower guidelines maximum. There is no such inconsistency, however, because the conclusion that the relevant "maximum" is the statutory maximum rests on the premise that Congress enacted the ACCA in 1986, long before this Court's *Apprendi* line of cases, and on the premise that this Court has since defined the guidelines maximum as the statutory maximum only "for *Apprendi* purposes." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004). Those premises, in turn, have no bearing on whether the "maximum term of imprisonment" is the real statutory maximum to which the defendant was actually subject, or the lowest statutory maximum to which a hypothetical first-time

offender *could* have been subject. As the courts of appeals to have addressed the issue have held (see Pet. 13 n.3), the former reading is the only one that is consistent with the statutory language.

3. The question presented in this case is an important one that warrants this Court's review. The Ninth Circuit has held that recidivist enhancements must be disregarded for purposes of determining whether an individual who has been convicted of possessing a firearm as a felon constitutes a career offender. The ACCA is an important tool in combating recidivist violent and drug-trafficking offenders, and this Court has frequently granted review to consider questions arising under that statute. See, *e.g.*, *Logan* v. *United States*, cert. granted, 127 S. Ct. 1251 (2007) (No. 06-6911); *James* v. *United States*, 127 S. Ct. 1586 (2007); *Shepard*, *supra*. It is a matter of common sense that many of the individuals who are potentially subject to the ACCA (because they have committed three prior offenses) would have been subject to recidivist enhancements for at least some of those prior offenses. And with regard to those individuals, the consequences of disregarding those recidivist enhancements may be dramatic: indeed, in this case, the 92-month sentence that respondent ultimately received was barely half the sentence that he would have received under the ACCA.

Nor are the consequences of the Ninth Circuit's approach limited to the ACCA context, as its earlier decision in *Corona-Sanchez* demonstrates. That decision construed the definition of "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), which not only affects a defendant's base offense level for immigration-related offenses, see Sentencing Guidelines § 2L1.2(b)(1)(C), but also has other conse-

quences under the immigration laws, see *Lopez* v. *Gonzales*, 127 S. Ct. 625, 628 (2006). And the Ninth Circuit has also applied the reasoning of *Corona-Sanchez* in other contexts, including to the question whether an offense constitutes a "felony punishable under the Controlled Substances Act" for purposes of the definition of "drug trafficking crime" in 18 U.S.C. 924(c)(2). See *United States* v. *Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002), cert. denied, 538 U.S. 915 (2003); but cf. *Lopez*, 127 S. Ct. at 630 n.6 (noting that state possession crimes that "correspond to * * * recidivist possession [under 21 U.S.C. 844(a)] * * * clearly fall within the definition[] used by Congress in * * * 18 U.S.C. § 924(c)(2)"). Because the statutes at issue in those cases (like the ACCA) are important (and, in the Ninth Circuit's view, are indistinguishable); because the Ninth Circuit has jurisdiction over a disproportionate share of the Nation's criminal and immigration cases; and because there is little prospect of the Ninth Circuit's receding from the approach it originally took in its en banc decision in *Corona-Sanchez* (particularly given its denial of en banc review here), this Court's review is plainly merited.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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